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Research Report

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Reprogramming the EU's Home Affairs Policy

Hostage to Political Short-Termism?

Daniela Kietz / Roderick Parkes

The EU has begun work on the Stockholm Programme, a strategic document to guide its Justice and Home Affairs cooperation over the next five years. The upcoming negotiations offer a welcome chance to give some farsighted direction to the policy area. If the Commission's June proposal is anything to go by, however, efforts are focused upon immediate political pressures. Rather than entering a new bout of programming out of sheer habit and falling prey to short-termism, the EU needs to reflect about what this document can achieve for the medium-term.

Due to set out priorities for the next five years of EU Justice and Home Affairs (JHA) cooperation, the Stockholm Programme is tabled for adoption at the European Council in December. It will inevitably be measured against its predecessors, the Tampere (1999) and Hague (2004) Programmes. The Tampere Programme in particular made a serious contribution to the ambition and medium-term coherence of the EU's interventions in this area.

The 1999 document was, however, adopted against an altogether rosier backdrop. Today, with the components of this sensitive and disparate policy-field at differing stages of development, with member states increasingly wary of supranational action and with uncertainty about the Lisbon Treaty's putative changes to the policy area, the Swedish Presidency will be

hard pushed to forge a meaningful programme. Yet, if JHA-programming is to be something more than a five-yearly expression of habit, the member states need to make the most of this opportunity.

The Commission's June Communication on "An Area of Freedom, Security and Justice serving the citizen" will form the basis for the upcoming inter-institutional discussions. The current assumption is that it will emerge largely unscathed from negotiations. For the member governments, this would be to miss a trick. Once the Communication's complex structure and jargon have been deciphered, the deficits in its three core functions—public diplomacy, policy-planning and horse-trading—become clear.

Deciphering the Commission Communication

Internal security strategy: under the umbrella term ‘internal security’, the Communication gathers proposals not only for police cooperation and criminal justice but also for border and visa policy. At the heart of future activities is to be an overarching Internal Security Strategy (ISS) which would dovetail with the EU’s external Security Strategy. The Communication remains unclear about the components of the ISS as well as about the possible role of the Internal Security Committee, a Council body described in the Lisbon Treaty. The Communication, itself supposedly a blueprint for a strategic document, thus shifts the onus for strategic thinking onto an upcoming document.

Data collection and exchange: a similar abdication of the strategic onus is apparent in the Communication’s prescriptions for a European information model. The goal of an information model figured prominently in many preparatory documents to the Communication and has been welcomed by most member states. Such a model is badly needed. The EU lacks a global, coherent and strategic approach to information-sharing and to the development of information technologies. The last years saw the emergence of a large number of measures on information exchange between all kinds of law enforcement authorities within the EU and with third states. These developed in a rapid and uncoordinated fashion—indeed many have not even been implemented. Again, however, the Communication puts off until later much of the required reflection about the basic components of such a model.

Border control: in border control, activism risks filling the vacuum left by well-grounded strategic thinking. The Communication foresees the collection and exchange of more data without proper attention to the prior evaluation of existing information systems. With its proposals for the development of the European Border Surveillance System and an electronic

entry/exit system, the Communication thus confirms the ambitious goals of the Commission’s 2008 “Border Package” for the further integration of border management. Yet, questions remain as to how effective such systems are in the fight against crime and illegal migration. The EU’s disastrous experiences with the Schengen Information System throw the technical practicalities of the Package into doubt, although again there is no trace of these concerns in the Communication.

Police and criminal justice: there is little evidence of activism in the Communication’s proposals on police cooperation and criminal justice. The modesty of these proposals mirrors the reservations of individual member states towards further integration in such sensitive fields. The focus is on consolidating and improving the application of existing instruments. Trust-building measures for police, border and legal professionals (training, exchange programs) are proposed. In criminal justice, the Commission merely foresees a new round of negotiations for measures that the Council was unable to agree upon under the Hague Programme (minimum standards for procedural safeguards) or where progress has been very modest (the evidence warrant). Similarly, in police cooperation, attention shifts from ‘hard’ EU measures to ‘soft’ initiatives like the promotion and networking of regional police cooperation outside the EU-framework. Only in the ‘external dimension’ of police cooperation, where member state dissent runs somewhat lower, are ambitions higher. Agreements with third states are foreseen, as is a strengthening of Europol’s external relations through closer connection to ESDP missions.

Asylum: the prescriptions for asylum policy sound grandiose: the establishment of a well-resourced Asylum Support Office; a mechanism for the intra-European resettlement of refugees; the mutual recognition of national asylum decisions by 2014. Not all these ideas are as ambitious as they appear—some goals, like the Support Office, are in fact well underway as the rump of a

previous agenda. Others are perhaps too ambitious. The proposals on mutual recognition have already met with resistance from some member states. In general, there is little national support for progress in the area of asylum. The majority of member states seem reluctant to countenance further legislative harmonisation in this area, preferring to concentrate on administrative cooperation as a means to ensure the uniform implementation of existing rules.

Immigration: the Communication calls for a flexible framework for immigration to the Union, a codex consolidating and honing the existing rights of legal immigrants and a coordination mechanism for national immigrant integration policies. These goals are alternately modest and non-committal. This belies the considerable 'growth potential' of this area. The Commission's ambitious plans for the policy area over the past decade have frequently foundered on the resistance of individual member states. Under the Lisbon Treaty, legal immigration would be dealt with under qualified-majority voting in Council and states would lose their individual veto. With the Treaty, therefore, the Commission could revert to its more ambitious approach. Without the Treaty, however, most activity in this area would probably be confined to less controversial goals such as attracting highly-qualified migrants, especially as the Union would continue to lack an explicit competence for dealing with immigrant integration.

First impressions: by turns ambitious and modest, activist and consolidating, the Communication betrays a bewildering array of characteristics. Yet some common traits do run through it—a displacement of the real strategic substance of programming to future documents, for example.

Its logic becomes clearer when immediate political pressures are taken into account. The Communication's adoption was buffeted by a tight timetable, the upcoming referendum in Ireland, an ambitious Swedish Presidency, internal wrangling in the Commission and scepticism from member

states exhausted by the process of legislating Home Affairs at the European level.

The effects of these pressures are apparent throughout. If the asylum policy prescriptions, for example, are at once unusually clear and out of step with most member governments' priorities, this is probably because uncertainty around the Treaty has little bearing on asylum policy-making and because the Swedish Presidency has an unusual desire to see further progress in the area.

Regardless of the political realities that forged it, evaluations of the Communication will likely focus on its substantive prescriptions—the age-old questions whether the EU's JHA goals are too security-centric or too weighted to national Executives' preoccupation with autonomy. Such a focus is no bad thing: the Communication and subsequent Programme should be transformative instruments, transcending immediate political constraints. All the same, such evaluations are relatively meaningless if the Programme has little effect upon the political process over the coming five years. And this is at present a very real possibility. It is therefore necessary to ask first what functions the Programme is meant to perform in the political process and how immediate political pressures are inhibiting this potential, before making recommendations about substantive content.

Public Diplomacy

Thanks to the high visibility of EU Summits, the adoption of the Programme at the December European Council could sharpen citizens' awareness of JHA cooperation. The communicational imperative is particularly pressing now, a decade after the Amsterdam Treaty revolutionised the treatment of JHA at the European level: this ten-year anniversary provides a fitting juncture for the kind of high-profile retrospection and prescription that could boost the legitimacy of the policy area.

The Commission has indeed stressed the importance of public diplomacy in its

proposal. As evidenced by the title “serving citizens”, an attempt was made to structure the Communication around the leitmotiv of the citizen. This decision was not, however, solely made with a view to bolstering the long-term legitimacy of JHA cooperation. Short-term exigencies featured heavily: the Communication was supposed to convey a positive message to the EU’s citizens ahead of the Irish referendum on the Lisbon Treaty.

That the Commission draft was completely rewritten up to four times suggests a difficulty in realising these communicational aspirations. Three issues must be addressed in the upcoming negotiations:

1. *Positive prescriptions or self-censorship?*

Such is the sophistication of the Commission’s communication strategy that it deals with the subject of the Treaty by banishing all mention of it. Even for practitioners, it is consequently difficult to tell which of the Communication’s prescriptions are dependent upon the entry into force of the Treaty and what could be achieved without it. A few issues centrally connected with the fate of the Treaty are mentioned (the EU’s possible accession to the European Convention of Human Rights). Other aspects—the development of a European Public Prosecutor—are missing.

The all-pervading absence of the Treaty in the Communication has given rise to wild speculation. Many practitioners have a suspicion (furiously rebutted) that the Commission is secretly preparing a ‘Lisbon-supplement’ to its Communication—it will flourish this should the Irish vote in the affirmative. For now, the result is simply confusion. The aversion to acknowledging the Treaty, coupled with constant allusions to its potential, results in a lack of clarity in key areas. For example, the Communication expresses the goal of a comprehensive data-protection framework which would apply to the full breadth of JHA policy. The success of this goal would be largely dependent upon the entry into force of a Treaty that collapses many of the institutional distinctions between the sub-policies of JHA.

If this self-censoring *modus operandi* is indicative of the future development of the *Citizens’ Area of Freedom, Security and Justice*, then the Irish have every right to be sceptical. With its emphasis on transparency, the Swedish Presidency should encourage use of the formula “if the Lisbon Treaty enters into force, we would [...]” in the further development of the Programme. This would allow the member governments to set more ambitious goals in areas where progress is currently hampered by unanimity in Council (legal migration, criminal justice). Such an approach would also simplify work should the Treaty’s Europe-wide ratification really be completed during the formulation of the Programme.

2. *Stocktaking or statement of intent?* There was reportedly pressure for the Communication to be so written that the Irish and other EU-citizens could refer to it to take stock of the last ten years of JHA cooperation and to learn about the priorities for the next ten. Alongside the original purpose of the Communication—to set political and operational guidelines for policymakers over the next five years—the effect is muddling.

In the Communication, it is difficult to distinguish between existing projects (the measures proposed in the Commission’s 2008 border package for example, or those contained in 2008’s Immigration Pact) and new projects to be launched by the Programme. Moreover, even when the Communication recapitulates projects already underway but not yet adopted, it is notable that some of the more controversial aspects, such as the current agenda in the area of legal migration, are all but absent from the text.

3. *Can JHA be a solely citizen-centred exercise?*

To structure the entire Communication from the perspective of the citizen is misleading. This is not simply because some policy areas, most obviously migration, must take account of non-EU-citizens and third countries: as a result of the effort to stress the citizen, policies which in practice have little to do with one another are clumped together. The chapter on data

protection sits with freedom of movement and citizenship, although it belongs with internal security issues. Civil protection is filed under the heading “citizens’ rights”. Meanwhile, individual policy areas are divided up and sprinkled across different chapters. Criminal justice is dealt with in two chapters—“A Europe that protects” and “The benefits to the citizen of a common judicial area”.

Policy Planning

As an institution, the European Council offers a strategic foresight and bird’s eye perspective of policymaking which the Commission and Council sometimes lack. Its Stockholm Programme is thus expected to set political and operational guidelines to steer JHA policy in a coordinated manner over an extended period. There is precedent for this: even the European Council’s much maligned Hague Programme elaborated forward-looking goals, complemented by basic timetables. It was on the basis of the Hague Programme that the Commission and Council compiled the more technical Action Plan laying out more than 250 measures for the legislative and non-legislative realisation of the Programme.

The Commission proposal lacks many of the planning qualities expected of a programme. The reasons again lie in short-term political pressures: in order to pre-empt dissent and facilitate the expeditious adoption of the Stockholm Programme, the Commission took account of the priorities of a large number of stakeholders. A public internet consultation was launched (almost rendered invalid by the wealth of responses from citizens of just one member state); Commission Vice-President Barrot held numerous bilaterals with government representatives, NGOs and experts; feedback was frequently invited from the various Commission Directorates General (DGs). The result of all this input is a Communication of remarkable complexity with each chapter differing in terms of structure and level of abstraction.

The drafters in the Commission had to contend with above all three ‘input pressures’ which inhibited their drafting work. The resulting deficits must be ironed out in the upcoming negotiations:

1. *Pressures internal to the Commission*: the drafters struggled to manage competing inputs from the Commission’s own Directorates General. The Commission decided, for example, to mainstream foreign policy issues throughout the Communication rather than affording them a dedicated chapter. This seems logical and conducive to the coherence of policy. This decision has however been undermined by a suspicion that the Commission was simply seeking to defuse tensions between DGs. The Commission’s last-minute decision for a mainstreaming approach is said to reflect its JHA team’s fear of inadvertently empowering the external relations DG. The member states now look set to formulate a separate chapter on the external dimension. If they go ahead, the content of the Programme will be coordinated around cross-cutting issues of very different qualities—“citizens’ rights” would now be complemented by the “external dimension”.

2. *Sceptical member states*: many member states have shown themselves sceptical towards further EU activity in almost all areas of JHA apart perhaps from borders, illegal immigration and data collection and exchange. The Communication purposefully conveys a lack of ambition to these governments. Indeed, in those areas of JHA where scepticism is at its most intense, the emphasis is less on the future direction of policy than the preconditions for it (“wide consultations” in the case of family reunification and a continued feasibility analysis for the joint processing of asylum applications). Of course, if taken seriously, such preliminary requirements could do much for the quality of new legislation and its implementation. Yet, the Commission appears to be proposing such exercises unwillingly, and many of its ideas are half-hearted. The Communication’s lack of real commitment to the evaluation and con-

solidation of existing measures is clear in its prescriptions on borders and information exchange. In these areas, where the Commission feels less bound to convey caution, it fails to call for the proper evaluation of existing measures.

3. *EU Presidencies*: at a time when its scope to achieve a productive Presidency is otherwise limited by uncertainty over the Lisbon Treaty, the Swedish government is pushing hard for the adoption of the *Stockholm Programme*. Yet the same factor that prevents it achieving a productive Presidency also cuts down the scope for the EU to produce a well thought out and meaningful Programme. Most policy watchers therefore expect the meat of the programming process to be pushed into the Commission's and Council's subsequent joint Action Plan.

This would be to devalue the programming process: in planning terms, the Action Plan will carry little of the weight that a European Council text could, and ought to function simply as a supplement to the Programme. It seems a forlorn hope that the Swedes will take advantage of the possibilities afforded under the Trio-Presidency arrangements and bring the process of formulating the *Stockholm Programme* to an end after the official end of their six-month term. For that reason, they have a particular duty to see that the meat is in the Programme itself.

The efficacy of the Action Plan itself is anyway imperilled thanks to the timetabling of the upcoming Spanish Presidency. The Spanish reportedly wish to see the Action Plan adopted at an early stage in their 2010 Presidency. According to the current timetable, the Commission will start work on the Action Plan in September. In other words, the Action Plan implementing the *Stockholm Programme* will be well-advanced before there is clarity about the Programme itself.

Other initiatives officially set to begin after the Programme's adoption are said to be underway already too: the Spanish have apparently started work on the Internal Security Strategy. Here as well, short-term

political ambitions are clouding the long-term development of JHA: motivated above all to show their citizens that they are securing solidarity from other member states in dealing with Basque terrorism, the Spanish have reportedly formulated a draft that has little of the strategic about it.

Horse-trading

In a policy field where tensions between member states run high, a programme can facilitate Council negotiations over the next five years by anticipating conflict lines. Using their capacity to "speak for their states", the heads of state and government can set goals and identify compromise packages. In order to facilitate the *Stockholm Programme's* adoption, however, the Commission has largely tiptoed around these conflict-lines.

Of particular salience are those tensions likely to persist in the period 2010-2014 regardless of political context or change of government. Such tensions are 'material' in nature, resulting from states' desire to 'get their fair share' from EU cooperation. In the upcoming negotiations on the Programme, the member states could usefully defuse these material tensions through a compromise package.

1. *Big vs. Small*: small member states often see an advantage in a comparatively high degree of European centralisation in JHA policy solutions, and have frequently joined with the Commission to promote such possibilities. Particularly when it comes to the creation of European agencies, small member states welcome the fact that large member states are obliged to commit a strong measure of resources to European endeavours when centralising solutions are adopted. Large member states' typical resistance to centralisation will become a point of tension should the Union further develop its offices and agencies for asylum, judicial, border, police and statistical co-operation over the coming years, or realise the Central Office for issuing visas as the Communication foresees.

Larger states in particular have successfully resisted the establishment of a strong European Asylum Office with powers to decide over cases. The Office now being established will have a much more restricted role. Yet, the Commission and some small member states have ambitions to see its powers expanded. Here, large countries' support for the strengthening of the EU border agency, Frontex, provides a useful concession to smaller, pro-centralisation member states, especially those on the EU's periphery.

2. *Rich vs. Poor*: poor member states with less advanced administrative infrastructures have often demanded 'solidarity' from their wealthier counterparts when dealing with problems of transnational crime and migration. They argue that EU membership leaves them open to problems for which they are not equipped. Yet, these richer states are fighting back. They deem their poorer EU partners happy to skimp on security controls because they know they will scarcely be affected by the noxious side-effects.

Not least in asylum policy, 'burden-sharing' and 'solidarity' have thus become considerable points of tension between the member states. Wealthier states have often resisted attempts to make it obligatory to aid those poorer member states which are not coping with asylum flows. Whilst these wealthier states may countenance the Communication's proposed mechanism for "internal resettlement", they will probably be keen for it to operate on the voluntary basis foreseen in the Communication. At the same time, they will demand a different kind of solidarity from poorer members, cajoling them to improve their administration of asylum. 'Administratively advanced' countries will be particularly concerned about the Communication's mention of "mutual recognition" of asylum decisions. Under such a system they fear having to recognise refugees who have gained asylum in a member state with lax administrative conditions.

Along this conflict line "rich vs. poor", wealthier states could sweeten their opposi-

tion to harder forms of burden-sharing by showing 'softer' solidarity to other member states and sharing the benefits of their expertise (such as in the handling of vulnerable asylum-seekers). This soft solidarity would essentially be self-interested: it would help other member states with weaker administrative systems raise their standards at very limited cost to wealthier countries. This sharing of expertise rather than of funds could also be applied to the construction and networking of information systems for the purposes of combating criminality. Financial issues usually play an important role in the development of the EU's information systems. The choice is often between Community-financed centralised solutions and the linking of national databases, for which modern information systems at national level are a pre-requisite. Committing themselves to share the expertise necessary to establish suitable national information systems could allow wealthier members to smooth the horse-trading around this issue.

3. *East vs. South*: in many EU policy areas, loose coalitions of member states are emerging to promote 'fairness' in the distribution of Union resources. These groupings seek to ensure that a policy benefiting one particular set of member states is also applied to their own region. In JHA, the tension is particularly marked between southern member states (affected by problems connected with Africa) and eastern members (affected by their proximity to the post-Soviet neighbourhood).

These groupings and coalitions have become particularly active since 2005, when the EU intensified its treatment of the external dimension of European Home Affairs. This was a relatively new area of Union activity, and the EU prudently sought to fathom the utility of policy measures by means of pilot projects. Such pilots tend to apply to just one geographical area. The resulting tensions mean that pilot projects focussed on, and tailored to, third countries around the southern perimeter of the EU increasingly have to be applied to countries

Figure 1
Projected Timetable for the Adoption of the Programme

June 2008	Report of the Future Groups, interior and justice ministers of recent and upcoming EU-presidencies, a “common law observer”, the Vice-President of the Commission and the President of the Citizens’ Rights Committee of the European Parliament
October 2008	Immigration Pact, formulated by interior and immigration and adopted by the European Council
9 th June 2009	Input paper from the British government on the future of the external dimension of JHA
10 th June 2009	Communication on the Programme, Commission
22 nd July 2009	Civil Liberties Committee of the European Parliament, exchange with Jacques Barrot on Commission Communication drawing upon relevant parliamentary Recommendations (criminal justice) and Resolutions (asylum/EU citizenship/ immigration policy)
September 2009	Bilaterals on the Programme in Stockholm, Swedish State Secretaries and individual member state governments possibly on the basis of a ‘non-paper’
2 nd October 2009	Irish Referendum on the Lisbon Treaty
6 th October 2009	COSAC, meeting on the Stockholm Programme
Late October 2009	Proposal for a Programme by the Swedish Presidency to be presented to COREPER based on MS reactions to the Commission Communication, Council meetings, and Presidency seminars on legal migration, asylum etc
November	Reports expected from relevant Committees of the European Parliament Service Consultation on the Action Plan expected, European Commission
30 th November	Justice and Home Affairs Council
10 th /11 th December 2009	Adoption of the Stockholm Programme, European Council
Early 2010	Adoption of a Joint Action Plan implementing the Programme, Commission and Council

Source: Official EU documents supplemented by interviews by the authors

at the eastern border, and vice versa, in order to ensure ‘fairness’. These pilot projects—be they “regional protection programmes” in the area of asylum, or “mobility partnerships” in the area of migration—are listed for treatment by the Communication. With its proximity to the EU’s eastern border and its growing support for projects dealing with migration from Africa, Germany can play a key role in forging compromise along this conflict line.

Perspectives

Planning documents like the Stockholm Programme are seldom the right medium to convey a political message to citizens. They should however offer a means for the public to check the veracity of a certain political message, such as the centrality of the citizen to JHA policymaking. In the present case, this would require the Programme to gain in clarity and structure, and to lose its overt political messages. Any

more ambitious attempt to use the Stockholm Programme as a tool of public diplomacy could actually be counterproductive to its communicational qualities and will unnecessarily disrupt its proper function as a tool of programming. It is instead the *ceremony* of adopting the Programme that should serve as a means to communicate directly with the EU's citizens. Ahead of the press conference for the December Summit, the member states need to identify key achievements of the past and key challenges for the future. This needs to be underpinned by a narrative, perhaps that already identified by Barrot, i.e., the contribution of JHA to the alleviation of the financial crisis.

If the Programme is to perform a proper policy-planning function, it could usefully be restructured. The alleviation of the pressure to communicate with citizens would facilitate this. The current makeup could then be replaced by a structure based around the component parts of JHA (asylum and immigration; visas and borders etc), and the following five issues could be explored for each component part in turn: the long-term development of the problems and opportunities faced by the EU in that area; the relevant political goals of related JHA policies; the political goals of key non-JHA policies (neighbourhood policy, Lisbon Strategy); the resulting political goals for that component part; the development of fitting policy tools. Many of these issues have already been addressed in the Communication.

If the member states wish to see their interests represented in the horse-trading that informs negotiations, they need to do more than identify 'red lines' and points of compromise. They must also come forward with input and ideas, preferably in time for September's bilaterals. The effectiveness of this kind of 'soft' input has recently been confirmed by the UK's tactical launch of an ideas paper on the external dimension of JHA. Other member governments could usefully formulate ideas on those areas where strategic input is particularly required or where conflict lines unusually

entrenched: the European Internal Security Strategy; the European information model and information system architecture; practical cooperation in asylum; and the external dimension of both migration and police cooperation.

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